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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

D/K MECHANICAL CONTRACTORS,
INC., et al.,

Plaintiffs and Appellants,

v.

MICHAEL JAY BERGER,

Defendant and Respondent.

G055393

(Super. Ct. No. 30-2012-00603143)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, David R. Chafee, Judge. Affirmed.

Shulman Hodges & Bastian, Ronald S. Hodges and J. Ronald Ignatuk for Plaintiffs and Appellants.

Law Offices of Michael Jay Berger and Michael Jay Berger for Defendant and Respondent.

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Plaintiffs and appellants D/K Mechanical Contractors, Inc. (D/K) and DGB Contractor Services, Inc. (DGB) (collectively plaintiffs) appeal from denial of their motion for new trial. They assert inconsistent verdicts and juror misconduct warranted a new trial. We disagree and affirm.

FACTS AND PROCEDURAL HISTORY

The facts on which the action was based are not central to this appeal. We provide a short summary for context.¹ In October 2012 plaintiffs² filed a complaint against defendant and respondent Michael Jay Berger (defendant) asserting various claims including legal malpractice, intentional misrepresentation, and intentional omission of material facts. As alleged in the complaint and set out in the prior opinion, plaintiffs, related companies in the construction industry, were mechanical contractors. In October 2011, one or both plaintiffs were parties to approximately 50 contracts valued at over \$100 million. They were not in default on any of their contracts and their vendor invoices were paid current. D/K's line of credit had been increased to \$4.4 million.

At that time plaintiffs owed \$500,000 to labor unions due in several weeks and were concerned about payment because of a short term cash flow problem. They consulted with defendant, a certified bankruptcy specialist. Defendant represented to plaintiffs he had worked with construction companies, bonding companies, and unions and understood the industry and the consequences if plaintiffs filed bankruptcy.

¹ This is the second time this case has been before us. In the first action, *D/K Mechanical Contractors Inc., et al. v. Berger* (Mar. 24, 2015, G049340) [nonpub. opn.], we affirmed the court's order setting aside the default and default judgment entered against defendant.

² BGD Enterprises, Inc. was also a named plaintiff in the action. It is not a party to this appeal.

Plaintiffs retained defendant who thereafter filed chapter 11 petitions for them. Five days later plaintiffs substituted current counsel, who moved to dismiss the bankruptcies.

Plaintiffs alleged they were severely harmed by the bankruptcy filings. Every contract to which they were parties, including surety bonds and loan agreements, went into default. Contract payments due them were paid to the surety instead. Two multimillion contracts for which plaintiffs were the successful bidders were never consummated because plaintiffs could not obtain a surety bond. Plaintiffs sought over \$10 million in damages plus restitution of payments made to defendant.

Plaintiffs alleged defendant committed legal malpractice by negligently advising them to file bankruptcy as well as negligently handling the bankruptcies by failing to use reasonable skill and care, and that defendant's representation was below the standard of care. Plaintiffs also alleged defendant intentionally misrepresented his experience and competence to represent them and failed to reveal he had little experience with or understanding of the construction industry, unions, and bonding companies or of the consequences of plaintiffs filing bankruptcy.

At the trial plaintiffs' motion for leave to amend the complaint to conform to proof was granted. The first amended complaint added causes of action for breach of fiduciary duty and constructive fraud.

The jury found for plaintiffs on the breach of fiduciary duty cause of action and for D/K on the constructive fraud cause of action. However, it could not reach a verdict on damages. It found, 9 to 3, in favor of defendant on the causes of action for legal malpractice, breach of contract, and fraud.

After completion of the trial plaintiffs' counsel interviewed three jurors and concluded there had been jury misconduct. Plaintiffs filed a motion for partial new trial on the legal malpractice and intentional fraud causes of action on that basis. Included

were declarations of three jurors, Rodger Beard (Beard), Carol Jun (Jun), and David Hale (Hale).

Beard's and Jun's essentially identical declarations explained that during deliberations seven or eight jurors "expressed reluctance" to find against defendant on the legal malpractice cause of action, "express[ing] concern" it might negatively affect his law license. Several jurors also "expressed sympathy" for defendant.

Beard and Jun stated in their declarations that during deliberations jurors discussed whether the industry custom and practice was for subcontractors to begin work before contracts and change orders were executed.³ Both also said juror Meredith Whitt (Whitt) commented that plaintiffs' expert testimony on that topic had no merit. Whitt advised she was a contract administrator for Cox Communications and worked closely with commercial construction contractors. Based on her personal experience, it was standard practice for contracts and change orders to be signed before any work began. Whitt also said "she would not consider voting" in favor of plaintiffs because failing to get a signed contract or change order before work commenced showed "extremely poor business judgment." Beard and Jun declared that, based on subsequent discussions, Whitt's statement "influenced jurors already sympathetic" to defendant.

Hale, the foreman, Beard, and Jun also recounted that after the jury reached a verdict in favor of D/K on constructive fraud, it deadlocked on damages and the legal malpractice and breach of fiduciary duty claims. Thereafter, six jurors who favored plaintiffs on the legal malpractice "suggested" they would change their position and vote

³ During trial plaintiffs' principals had testified it was common in the industry for subcontractors to begin work before contracts and change orders were executed due to the contracts' complexities. This was relevant to whether plaintiffs had sustained damages by losing contracts. They also testified general contractors can incur penalties if work is not timely completed and required subcontractors to begin work immediately after the contract is awarded. Defendant denied this and testified an unsigned change order had no value.

for defendant on that cause of action if the six other jurors would change their votes to favor plaintiffs on the breach of fiduciary duty claim to resolve the deadlock. “As a result of these negotiations,” enough jurors changed their position to result in a verdict in favor of defendant on the legal malpractice cause of action and in favor of plaintiffs on the breach of fiduciary duty claim. According to the three jurors’ declarations, the agreement “did not involve deliberations whereby any juror stated that he or she had been persuaded to change his or her vote based upon the law and the evidence.”

The court denied the new trial motion on plaintiffs’ legal malpractice and intentional fraud claims, and conducted a retrial of the breach of fiduciary duty and constructive fraud causes of action only. At the second trial the jury found in favor of plaintiffs on both causes of action, awarding just over \$10,000.

After the second trial, plaintiffs then filed a second motion for new trial on the legal malpractice and fraud causes of action based on alleged jury misconduct in the first trial and a motion for new trial on the legal malpractice cause of action based on inconsistent verdicts in the first trial. The court took judicial notice of the previously submitted declarations of Beard, Jun, and Hale, and denied all of the new trial motions.

DISCUSSION

1. Standards of Review

A trial court uses a multistep process when considering a new trial motion based on juror misconduct. (*Barboni v. Tuomi* (2012) 210 Cal.App.4th 340, 345 (*Barboni*)). It determines whether the declarations supporting the motion are admissible, whether the facts show misconduct, and whether the misconduct was prejudicial. (*Ibid.*)

We review the rulings regarding admissibility of the juror declarations for abuse of discretion. (*Barboni, supra*, 210 Cal.App.4th at p. 345.) We also review the determination about jury misconduct for abuse of discretion (*Whitlock v. Foster Wheeler, LLC* (2008) 160 Cal.App.4th 149, 160), deferring to the trial court’s findings of fact and credibility determinations if supported by substantial evidence (*Barboni*, at p. 345).

Where, as here, the motion for new trial is denied, if we determine there was juror misconduct, prejudice is presumed. Prejudice may be rebutted by proof there was no actual prejudice. (*Hasson v. Ford Motor Co.* (1982) 32 Cal.3d 388, 416). We review the question of prejudice independently (*Whitlock v. Foster Wheeler, LLC, supra*, 160 Cal.App.4th at p. 158), examining the entire record to determine if there is a reasonable probability the plaintiffs were harmed (*Hasson*, at p. 417).

As to a motion for new trial based on inconsistent verdicts, “a trial judge is accorded a wide discretion in ruling on a motion for new trial and . . . the exercise of this discretion is given great deference on appeal.” (*City of Los Angeles v. Decker* (1977) 18 Cal.3d 860, 871-872.) Where the motion is denied, “we must fulfill our obligation of reviewing the entire record, including the evidence, so as to make an independent determination as to whether the error was prejudicial.” (*Id.* at p. 872.)

2. *Inconsistent Verdict Claims*

Plaintiffs argue the first trial verdicts on breach of fiduciary duty in their favor and on legal malpractice in defendant’s favor warrant a new trial on the latter cause of action because inconsistent verdicts are “““against the law””” and mandate a new trial. (*Shaw v. Hughes Aircraft Co.* (2000) 83 Cal.App.4th 1336, 1344.)⁴

We are not convinced the verdicts were inconsistent. To begin with, in the first trial there was only a finding, not a verdict, on breach of fiduciary duty. And the parties do not dispute that the \$10,000 damage award in the second trial represented attorney fees to be refunded to plaintiffs. This damage award was consistent with a finding defendant breached his fiduciary duty.

⁴ Defendant’s argument, citing only a Florida case, that plaintiffs waived the right to appeal on this issue because they failed to object before the jury was discharged is incorrect. Such an objection is not required under California law. (*Lambert v. General Motors* (1998) 67 Cal.App.4th 1179, 1182.)

However, the \$10 million plus plaintiffs sought was for malpractice, i.e., defendant's filing of the bankruptcy action and allegedly mishandling it. So, it was not inconsistent for the jury to render a defense verdict on the malpractice claim while at the same time awarding plaintiffs \$10,000 in damages on the breach of fiduciary duty claim.

But even if the verdicts were inconsistent, plaintiffs suffered no prejudice. (*F.P. v. Monier* (2017) 3 Cal.5th 1099, 1108 [no reversal absent prejudicial error].) In denying the motion for a third trial the court noted that at the second trial plaintiffs "presented much of the same evidence to another jury, and sought the same basic damages, as in the first trial." It found all of the causes of action alleged were based on "the same core events." It also observed the retrial of the breach of fiduciary duty claim had actually included malpractice too because the jury was instructed on malpractice as part of that claim. And finally, the verdict in the second trial was based "on the same tort damages that were requested across the whole case and claims."

Plaintiffs claim the issue was not whether they presented the same evidence in the second trial. But it really is. If, for the sake of argument, we accept plaintiffs' premise that every breach of fiduciary duty by a lawyer is malpractice, then any evidence of breach of fiduciary duty they introduced is, by definition, evidence of malpractice as well. If there was some conduct allegedly constituting malpractice separate and distinct from the conduct constituting breach of fiduciary duty that was not presented in the second trial, then plaintiffs might have an argument they were deprived of a trial on malpractice. But there was not.

Again, the court found the evidence presented and damages sought in the second trial were essentially the same as in the first trial. Plaintiffs do not direct us to anything in the record to dispute these findings and we must accept them as true. That legal malpractice was not separately identified on the verdict form in the second trial is not controlling. The jury still had the opportunity to consider all the same evidence and award all the same damages plaintiffs requested on both theories.

Consequently, plaintiffs have not shown the court abused its discretion in denying the motion for new trial based on the alleged inconsistent verdicts.

3. Juror Misconduct

“Upon an inquiry as to the validity of a verdict, any otherwise admissible evidence may be received as to statements made, or conduct, conditions, or events occurring, either within or without the jury room, of such a character as is likely to have influenced the verdict improperly. No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined.” (Evid. Code, § 1150, subd. (a).)

““Evidence of jurors’ internal thought processes is inadmissible to impeach a verdict. [Citations.] Only evidence as to objectively ascertainable statements, conduct, conditions, or events is admissible to impeach a verdict. [Citations.] Juror declarations are admissible to the extent that they describe overt acts constituting jury misconduct, but they are inadmissible to the extent that they describe the effect of any event on a juror’s subjective reasoning process. [Citation.] Accordingly, juror declarations are inadmissible to the extent that they purport to describe the jurors’ understanding of the instructions or how they arrived at their verdict. [Citations.]’ [Citation.]” (*Barboni*, *supra*, 210 Cal.App.4th at p. 349.)

Plaintiffs claim there were three instances of juror misconduct in the first trial: 1) Whitt’s informing the jury of her personal experiences working for a communications company, challenging plaintiffs’ credibility, and her alleged resulting refusal to deliberate; 2) jurors’ consideration of the impact of a legal malpractice verdict on defendant’s ability to practice law; and 3) jurors’ trading votes to break a deadlock on the legal malpractice and breach of fiduciary duty claims.

a. Whitt's Personal Experiences

The court characterized the juror declarations as “fairly conclusory.” It discounted Whitt’s statements about her personal experience dealing with construction contractors as conclusory, describing them as characterizations rather than specific statements. It also pointed out defendant disputed the testimony of plaintiffs’ principals, putting their credibility at issue. As to Whitt’s statement change orders and contracts were signed before work began, the court noted defendant similarly testified those same documents had no value if not signed. He also testified plaintiffs did not disclose to him the contracts and change orders they claimed they lost as a result of the bankruptcy. The court cited case law that jurors must be allowed to use their experience in considering the evidence and are not prohibited from referring to their backgrounds.

Plaintiffs argue Whitt violated CACI No. 5009, which instructed the jurors not to make statements or provide information based on “special training or unique personal experiences,” because they are not evidence. But “[i]t is an impossible standard to require . . . [the jury] to be a laboratory, completely sterilized and freed from any external factors.’ [Citations.] . . . A juror may not express opinions based on asserted personal expertise that is different from or contrary to the law as the trial court stated it or to the evidence, but if we allow jurors with specialized knowledge to sit on a jury, and we do, we must allow those jurors to use their experience in evaluating and interpreting that evidence. Moreover, during the give and take of deliberations, it is virtually impossible to divorce completely one’s background from one’s analysis of the evidence. We cannot demand that jurors, especially lay jurors not versed in the subtle distinctions that attorneys draw, never refer to their background during deliberations.” (*People v. Steele* (2002) 27 Cal.4th 1230, 1266; *Bandana Trading Co., Inc. v. Quality Infusion Care, Inc.* (2008) 164 Cal.App.4th 1440, 1447 [no prejudicial misconduct by

juror referring to her accounting expertise; “[j]urors are entitled to rely on their general knowledge and experience in evaluating the evidence”].)

We agree with the trial court, Whitt’s personal experience statements did not warrant a new trial. The declarations that Whitt’s statements influenced jurors who were sympathetic to defendant were vague and conclusory. But even if Whitt’s statements could be considered to be improper plaintiffs were not prejudiced. As noted, defendant’s testimony was generally consistent with Whitt’s statements. He contradicted the testimony of plaintiffs’ principals and called their credibility into question, separate from what Whitt said. There is no evidence the jurors relied on Whitt’s statements as opposed to defendant’s testimony. Thus, our independent examination of the record does not show a reasonable probability plaintiffs were prejudiced by Whitt’s statements.

Finally, Whitt’s statement “she would not consider voting” for plaintiffs is inadmissible evidence of her mental process or reasoning. (*Barboni, supra*, 210 Cal.App.4th at p. 349.) Even if admissible, it does not show Whitt failed to deliberate. Instead, it shows Whitt evaluated the evidence, the task with which she was charged.

b. Jurors’ Sympathy

The court again characterized statements in the declarations regarding the jurors’ sympathy as “vague and conclusory,” specifically pointing to the terms “expressed reluctance,” “expressed concern, and expressed sympathy.” It explained the characterizations might “border on describing subjective mental states,” rather than stating “specific overt statements.” It stated the statements did not show jurors completely disregarded evidence and “reached an improper verdict.”

Plaintiffs claim the jurors erred by considering matters outside the record, i.e., the effect of a malpractice judgment on defendant’s law license. We are not persuaded. Those statements are not objectively ascertainable evidence the jurors found in favor of defendant on that basis. “[W]hen a juror in the course of deliberations gives the reasons for his or her vote, the words are simply a verbal reflection of the juror’s

mental processes. Consideration of such a statement as evidence of those processes is barred by Evidence Code section 1150.” (*People v. Lewis* (2001) 26 Cal.4th 334, 389.)

Therefore, the declarations do not establish the jurors improperly relied on sympathy to reach their verdict.

c. Vote Trading

The court was “not clear” about the admissibility of the jurors’ statements on this issue, noting the cases were not consistent in their treatment of the question. It stated the conclusion jurors switched voted as a result of the suggestion to do so “could be read as impliedly trying to relay the subjective reasoning behind other people’s votes,” which is inadmissible.⁵ However, even assuming the statements were admissible, the court found plaintiffs relied on “the same core evidence, exhibits and witnesses” in both trials, and sought “the same basic monetary damages.” Although the second trial was for constructive fraud and breach of fiduciary duty, legal malpractice was tried in the second trial too, as explained above. The court relied on jury instructions and exhibit lists in support of this finding.

Plaintiffs argue trading votes violated CACI No. 5009 requiring that jurors base their decisions on their own evaluation of the evidence. They contest the court’s finding the statements about the vote trade showed the subjective reasoning of jurors.

Even assuming the declarations were admissible and showed vote trading misconduct, they nonetheless do not support a motion for a third trial. As discussed above, plaintiffs received a second trial where essentially the same evidence and same request for damages as to legal malpractice and breach of fiduciary duty were presented. Thus, plaintiffs were not prejudiced, and the new trial motions were properly denied.

⁵ The court also stated plaintiffs did not timely request retrial of the malpractice claims, but plaintiffs point out it was part of their original motion for new trial after the first trial. Our decision is not based on any alleged delay.

DISPOSITION

The judgment is affirmed. Defendant is entitled to costs on appeal.

THOMPSON, J.

WE CONCUR:

MOORE, ACTING P. J.

FYBEL, J.